
NO. 34700

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

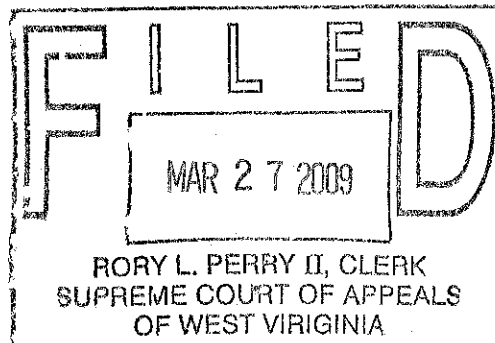
**DAVID BALLARD, Warden,
Mount Olive Correctional Center,**

Appellee,

v:

**STATE OF WEST VIRGINIA
ex rel. DAVID ROSENBERGER,**

Appellant.



BRIEF OF APPELLEE

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE	1
II. STATEMENT OF THE FACTS	2
III. STANDARD OF REVIEW	5
IV. ARGUMENT	6
A. THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL	6
1. Failure to Hire Independent Forensic Pathologist.	7
2. Diminished Capacity and Competency at the Time of Trial	13
3. Failure to Subpoena a Key Witness	15
4. Failure to Conduct a Proper Investigation	17
B. CUMULATIVE ERROR	19
1. The Prosecutor Did Not Improperly Vouch the Record	20
2. Dr. Sopher's Testimony	21
3. Venue	21
4. Premeditation	22
5. Chief Investigator Martin's Notes	23
6. Kathy Cottrill	23
7. <i>Guthrie</i> Instruction	24
V. CONCLUSION	25

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Bentley v. Scully</i> , 41 F.3d 811 (2d Cir. 1994)	20
<i>Coble v. Quarterman</i> , 496 F.3d 430 (5th Cir. 2007)	15
<i>Commonwealth v. Freeman</i> , 712 N.E.2d 1135 (Mass. 1999)	20
<i>Commonwealth v. Haggerty</i> , 509 N.E.2d 1163 (Mass 1987)	7, 12
<i>Commonwealth v. Wilson</i> , 693 N.E.2d 158 (Mass. 1998)	20
<i>Darden v. Wainright</i> , 477 U.S. 168 (1986)	20
<i>Daubert v. Merrell Dow Pharm.</i> , 509 U.S. 579 (1993)	12
<i>King v. State</i> , 649 S.W.2d 42 (Tex. Crim. App. 1983)	8, 15
<i>Lawrence v. Armontrout</i> , 900 F.2d 127 (8th Cir. 1990)	8
<i>Marshall v. Lonberger</i> , 459 U.S. 422 (1983)	5
<i>Martin v. McCotter</i> , 796 F.2d 813 (5th Cir. 1986)	7
<i>Morris v. Boppa</i> , 182 W. Va. 248, 387 S.E.2d 302 (1989)	11
<i>Neal-Lomax v. Las Vegas Metropolitan Police Department</i> , 574 F. Supp. 2d 1193 (D. Nev. 2008)	12
<i>Phillips v. Fox</i> , 193 W. Va. 657, 458 S.E.2d 327 (1995)	6
<i>Procter v. Butler</i> , 831 F.2d 1251 (5th Cir. 1987)	7
<i>Provenzano v. Singletary</i> , 148 F.3d 1327 (11th Cir. 1998)	11
<i>Sawyer v. Butler</i> , 848 F.2d 582 (5th Cir. 1988)	7
<i>Specht v. Jensen</i> , 853 F.2d 805 (10th Cir. 1988)	11

<i>State ex. rel. Hatcher v. McBride</i> , 221 W. Va. 760, 656 S.E.2d 789 (2007)	11
<i>State ex. rel. McMannis v. Mohn</i> , 163 W. Va. 129, 254 S.E.2d 805 (1979)	5, 19
<i>State ex. rel. Phillips v. Legursky</i> , 187 W. Va. 607, 420 S.E.2d 743 (1992)	19
<i>State v. Bailey</i> , 151 W. Va. 796, 155 S.E.2d 850 (1967)	6
<i>State v. Bragg</i> , 140 W. Va. 585, 87 S.E.2d 689 (1955)	13
<i>State v. Brown</i> , 210 W. Va. 14, 552 S.E.2d 404 (2001)	19
<i>State v. Guthrie</i> , 194 W. Va. 657, 461 S.E.2d 163 (1995)	23, 24
<i>State v. LaRock</i> , 196 W. Va. 294, 470 S.E.2d 613 (1996)	20
<i>State v. Osakalumi</i> , 194 W. Va. 758, 461 S.E.2d 504 (1995)	23
<i>State v. Schermerhorn</i> , 211 W. Va. 376, 566 S.E.2d 263 (2002)	19
<i>State v. Smith</i> , 156 W. Va. 385, 193 S.E.2d 550 (1972)	19
<i>State v. Walls</i> , 170 W. Va. 419, 294 S.E.2d 272 (1982)	24
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	6, 7, 17, 19
<i>Tennant v. Marion Health Care Foundation, Inc.</i> , 194 W. Va. 97, 459 S.E.2d 374 (1995)	19
<i>United States v. Nichols</i> , 169 F.3d 1255 (10th Cir. 1999), <i>cert. denied</i> , 528 U.S. 934 (1999)	19
<i>Westberry v. Gislavid Gummu AB</i> , 178 F.3d 257 (4th Cir. 1999)	13
STATUTES:	
W. Va. Code §§ 53-4A-1 <i>et seq.</i>	2

OTHER:

Leahy, Monique C.M., J.D., *Autopsies*, 98 Am. Jur. POF 3d 87, § 28 (2007) 8

W. Va. R. Evid. 704 11

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Appellant.

BRIEF OF APPELLEE

I.

STATEMENT OF THE CASE

David Rosenberger, Petitioner below (hereafter Appellant), appeals the June 19, 2007, final order of the Circuit Court of Putnam County (Eagloski, J.), denying his petition for post-conviction relief. (HR 549.²) Appellant's habeas petition challenged the constitutionality of Appellant's

¹Howard Painter is no longer the warden at the Mount Olive Correctional Complex, where Appellant is incarcerated. David Ballard is presently Warden of the facility, and has therefore been substituted as the party Appellee pursuant to Rule 25(d)(1) of the West Virginia Rules of Civil Procedure.

²References to pages in the record of the proceedings below shall appear as "TR "; pages from the transcript of Appellant's trial of October 30, 1995-November 2, 1995, will be cited as "TT." References to the post-conviction record shall appear as "HR." Transcripts of the omnibus evidentiary hearing shall appear as "OH." Citations to the Supplemental Record will be cited as "SR."

incarceration upon his November 1995 conviction for First Degree Murder. (TR 93-94.) The trial court sentenced Appellant to life without mercy. (TR 120-21.) This Court refused Petitioner/Appellant's direct appeal on January 9, 2001.³ (TR 201.)

On July 27, 2001, Appellant, appearing *pro se*, filed a petition for post-conviction relief under West Virginia Code §§ 53-4A-1 *et seq.* in the Circuit Court of Putnam County. (HR 1.) By order entered July 27, 2001, the state habeas court appointed Timothy J. LaFon defense counsel. (HR. 13.) Defense counsel submitted an amended petition and memorandum of law on May 14, 2002. (HR. 35-102.) The court convened an omnibus evidentiary hearing on May 12, 2004. Upon careful review of the evidence, including the testimony of the witnesses, the state habeas court denied Appellant's request for relief by final order ("Order") entered June 19, 2007.

II.

STATEMENT OF THE FACTS

On October 19, 1987, the Appellant, Kevin Warner, and Ernie Templin murdered John Fallecker. Mr. Fallecker's body was found lying face-up in a creek located in a secluded part of Putnam County.⁴ (TT 253-57, 346-47.) Both Appellant and Mr. Warner wanted revenge. Mr. Fallecker had sexually assaulted the Appellant's girlfriend Wendy [Warner] Harrison while she was in an intoxicated stupor. (TT 85.) Although Ms. Warner appeared ready to forgive and forget, the

³The Appellant raised the same issues in his direct appeal that he raised as part of the cumulative error claim presently before this Court. (TR 202-03.) These very same issues were also raised in the Appellant's motion for a new trial, (TR 105), which was rejected by the trial court on December 12, 1999.

⁴State Trooper Charles Martin testified that he found Mr. Fallecker's body: "In *Putnam County*, approximately six miles out from [Route] 60 on a side road in a creek. I refer to it as Trace Creek, or Trace Fork o[r] Mud River." (TT 253; emphasis added.)

Appellant, her boyfriend, and her brother, Mr. Warner, were not. Before killing him, the Appellant appeared at Mr. Fallecker's house causing such a disturbance that officers from the Saint Albans Police Department were dispatched. (TT 5-7; 441, 443-44, 458-59.)

Upon a grant of full immunity, State's witness Kevin Warner, Ms. Harrison's brother, testified that the evening of the murder he, Ernie Templin,⁵ and the Appellant found Mr. Fallecker passed out in an field near a bar in Saint Albans called Rails. (TT 8-9, 87, 178-82, 190.) Mr. Fallecker was obviously intoxicated.⁶ (TT 11, 195.) The Appellant, Mr. Templin, and Mr. Warner loaded the victim into the hatch of the Appellant's car and drove off of Route 60 across Coal Mountain to a secluded bridge crossing Trace Creek on Route 34 heading towards Hamlin, West Virginia. (TT 191.) Mr. Warner testified that the plan was to "whip" the victim's "ass." (TT 9, 192.)

Upon arriving, Mr. Fallecker⁷ and the Appellant walked off the bridge and up an embankment to relieve themselves. (TT 194.) Mr. Templin and Mr. Warner remained standing behind the car. Upon their return, the Appellant, Templin, and Warner hit the victim causing him to fall to the ground. (TT 196.) Warner admitted that he hit Mr. Fallecker on the head with a tire iron. (TT 196.) During the autopsy, the State's pathologist found an open gash, two and one-half inches long running along the back of the victim's skull. (TT 305.)

⁵By the time of Appellant's trial, Mr. Templin resided out of state. Neither the State nor the defense subpoenaed him.

⁶At the time of his autopsy, the victim's BAC was .24. (TT 307.)

⁷Initially, Mr. Fallecker did not know who these people were.

The Appellant then picked the victim up and threw him over the side of the bridge into the creek. (TT 197.) After hearing moans from below, the Appellant and Mr. Templin went around the car and under the bridge. Although he could only see Mr. Templin, Mr. Warner heard Templin say "Hold him, hold him, hold him. Don't turn him loose." (TT 197-98.) Both the Appellant and Mr. Templin returned to the car shortly thereafter. Mr. Fallecker was not with them. Mr. Warner testified that their clothes were wet and muddy. The Appellant told Mr. Warner that he had held Mr. Fallecker's head below the water until he stopped struggling. (TT 14, 198.) The trio returned to Mr. Templin's home disposing of their clothes and shoes. (TT 199.)

The State's investigation came to a dead end in 1987. The State reopened the investigation in 1995 when the Appellant made incriminating statements to different individuals. He told Ms. Harrison that he had beat Mr. Fallecker and thrown him over the bridge, and that his face was the last face Mr. Fallecker saw before he died. (TT at 68.) He also told Ms. Harrison that, as he held Mr. Fallecker's head under the water, his eyes bulged and he vomited. (TT 88-89.)

Appellant's best friend Kathy Cottrill testified that the Appellant admitted to beating Mr. Fallecker and throwing him over a bridge. (TT 278-279.) The Appellant told Ms. Cottrill's daughter, Katrina Young, he had killed before and would do it again. (TT 271.) The Appellant told friend John Morris that he had killed someone for raping his girlfriend. (TT at 286.)

Dr. Irvin Sopher was the State's final witness. Dr. Sopher did not perform the autopsy; instead, he testified from autopsy notes prepared by another pathologist. An external examination revealed a two and one-half inch gash running along the right rear portion of the victim's head. The laceration penetrated to the bone. (TT 305.) Below the gash there was a V-shaped depressed skull fracture. (*Id.*) On cross-examination Dr. Sopher testified that this injury could have been produced

by a tire iron. (TT 324.) Mr. Fallecker also had a bruise on his left upper forehead area, a black eye, a lacerated chin, several small bruises on the left side of his neck, and small hemorrhages in the muscles around his voice box and windpipe. (TT 304-05, 309.) Dr. Sopher could not rule out the possibility of the application of pressure to the victim's neck prior to death. (TT 309, 325.)

The post-mortem examination record, released in 1987, stated that the victim died from cranial injury caused by blunt force trauma to the head and drowning. (TT 327-28.) On cross-examination Dr. Sopher set the cause of death at drowning, with cranial injury as a contributory element. (TT 328-29.) He based this opinion on the presence of muddy water in the victim's food pipe and stomach. (TT 310.) The presence of this water, which would have been inhaled while Mr. Fallecker's head was underwater, proved that he was alive when he initially hit the water. (TT 310.)

The State pathologist that performed the victim's autopsy originally estimated the time of death at October 17, 1987. (TT 311.) After discussing the matter with law enforcement the date was moved back to October 12. (TT 316.)

III.

STANDARD OF REVIEW

"A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." Syl. Pt. 4, *State ex. rel. McMannis v. Mohn*, 163 W. Va. 129, 254 S.E.2d 805 (1979). Thus, a habeas appeal does not authorize this Court to redetermine credibility of witnesses whose demeanor has been observed by the jury in the first instance. *Marshall v. Lonberger*, 459 U.S. 422, 434-35 (1983) ("fairly supported by the record" standard in federal habeas does not authorize a broader review of state court credibility

determinations than are authorized in direct appeals within the federal system); Syl. Pt. 2 *State v. Bailey*, 151 W. Va. 796, 155 S.E.2d 850 (1967) (“The jury is the trier of facts and in performing that duty is the sole judge as to the weight of the evidence and the credibility of the witnesses.”).

In reviewing challenges to the findings and conclusions of the circuit court [from a habeas proceeding], this Court applies a two-pronged deferential standard of review. The Court will review the final order and the ultimate disposition under an abuse of discretion standard. Findings of fact will not be set aside on appeal unless they are clearly wrong. Questions of law are subject to *de novo* review. *Phillips v. Fox*, 193 W. Va. 657, 458 S.E.2d 327, 331 (1995).

IV.

ARGUMENT

A. THE APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Appellant first claims that he was denied effective assistance of counsel. In support of this claim Appellant asserts that defense counsel failed to introduce expert testimony to rebut Dr. Sopher’s testimony regarding the cause of death, to request a psychological examination, to argue diminished capacity, to object to several incidents of prosecutorial misconduct, and to conduct a proper pre-trial investigation.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the United States Supreme Court set forth the appropriate standard:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s

errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687.

“The burden that *Strickland* imposes on a defendant is severe.” *Procter v. Butler*, 831 F.2d 1251, 1255 (5th Cir. 1987). In order to satisfy the deficiency prong of the *Strickland* test for example, the defendant must demonstrate that counsel’s representation fell below an objective standard of reasonableness by prevailing professional standards. *Martin v. McCotter*, 796 F.2d 813, 816 (5th Cir. 1986). Given the almost infinite variety of possible trial techniques and tactics available to counsel, we must be careful not to second-guess legitimate strategic choices which may now seem ill-advised and unreasonable. We have stressed that “great deference is given to counsel, ‘strongly presuming that counsel has exercised reasonable professional judgment.’” *Id.* at 816 (quoting *Lockhart v. McCotter*, 782 F.2d 1275, 1279 (5th Cir. 1986)). See also *Sawyer v. Butler*, 848 F.2d 582, 588 (5th Cir. 1988).

1. Failure to Hire Independent Forensic Pathologist.

The Appellant claims that, although present when the victim died, his conduct was not the efficient cause of the victim’s death. See *Commonwealth v. Haggerty*, 509 N.E.2d 1163, 1164-65 (Mass 1987) (state must prove that defendant’s conduct was the efficient cause, *i.e.* cause that necessarily sets in operation factors which cause victim’s death.). Mr. Warner admitted hitting the victim with a tire iron, after which the victim was dropped in the river. At trial, Appellant contended that the victim was either already dead when he hit the water or, due to his intoxication and the blow to the head, died shortly thereafter.

To prevail the Appellant must prove that the decision not to engage an expert was not a strategic one. Appellant must also do more than speculate as to what might have been proven had the expert been called. He must adduce reliable and concrete evidence as to what would have been shown, and how this evidence undermines the reliability of the outcome. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) (“A claim of ineffective assistance of counsel based on counsel’s failure to call witnesses fails in the absence of a showing that such witnesses were available to testify and the defendant would have benefitted from their testimony.”); *Lawrence v. Armontrout*, 900 F.2d 127, 130 (8th Cir. 1990) (to prove prejudice petitioner must demonstrate that the uncalled witnesses testimony would have been favorable, and how such testimony would have changed the result.).

The State’s autopsy report said that the victim died from cranial trauma, and drowning. Although Dr. Sopher opined that drowning was the primary cause of death,⁸ the defense, without the assistance of its own expert, effectively cross-examined him regarding the cranial trauma and the role it might have played in the victim’s death. (TT 321, 328.) Defense counsel also impeached Dr. Sopher on the number of contusions found on the victim’s neck. (TT 324-25.) He pointed out that Dr. Sopher modified the time of death after speaking with law enforcement.

⁸The cause of death may be due to multiple factors.

Sometimes the original precipitant of the death is listed as being the primary cause. Thus, if the patient dies of a heart attack due to the stress of an otherwise non-fatal gunshot wound, the pathologist may list as the cause of death either the gunshot wound, the pre-existing heart condition, the heart-attack, some element of the heart attack such as myocardial ischemia or coronary insufficiency, or some combination of the above.

Monique C.M. Leahy, J.D., *Autopsies*, 98 Am. Jur. POF 3d 87, § 28 at 155 (2007).

During his deposition Mr. Casey testified that the decision not to hire an expert was strategic:

Q: As I understand that you didn't do the legwork of the investigation, but do you know if you or Mr. Dameron considered getting your own expert, as to the corner report and those issues?

A: I never considered. I don't think that Charlie ever considered it.

Q: Okay. And do you know why you didn't consider it?

A: Didn't think that it was necessary given what we knew from Kevin's [McCallister's] statement, as to hitting him over the head with a tire iron. *And actually, I think, that we discussed it and thought that the autopsy report that we got helped out case.*

(ED 31; emphasis added.)

During the omnibus hearing Mr. Casey testified:

Q: And the defense not only didn't have an expert, really the defense never even sought consultation with one, did they?

A: That's correct.⁹

Q: Okay.

A: And that might have been because we just, we saw the autopsy report and said, well this is a defense right here.

(OH 35.)

Q: Alright. Did you know whether Mr. Dameron or yourself or anybody, I guess that would include Mr. McCallister or anybody on your behalf, interviewed the Coroner who actually did the autopsy.

A: No.

⁹Taken within the context of Mr. Casey's prior testimony regarding the separation of responsibilities between defense counsel, he would have no idea whether Mr. Dameron spoke to an expert prior to trial, or if he considered the issue and rejected it.

What is clear is that Mr. Casey testified that he considered the autopsy report and decided that this report, standing on its own, would be sufficient. (ED 31; OH 35.)

Q: Nobody did?

A: Nobody did.

Q: Do you think it should have been done.

A: I don't know that maybe it should have been done. I don't know what . . . We had his report. The report was not – the way that I read the report – there was some errors in it, because they didn't know what time of death was. But other than that, *I don't think that the report was that damaging to us*, until Sopher got on and started playing –

(OH 41; emphasis added.)

The effectiveness of defense counsel's trial strategy was apparent during Dr. Sopher's redirect:

Q: All right. Your answer was, or your initial answer I believe, was drowning and cranial injury, and the cranial injury was the contributory element. Would you care to explain what that means to the jury?

A: Let me just say that with head injuries that this gentleman suffered that that alone *could conceivably result in unconsciousness. We have no way of knowing just from the autopsy itself the state of consciousness at the time he drowned.* What we know for certain is that Mr. Fallecker had drowned. Now, how much of a role the alcohol, how much of a role that head injury played in predisposing him to being in the drowning environment, unless we were there we could not say. So that's what that means.

(TT 329-30; emphasis added.)

To bolster his claim, the Appellant called former Kanawha County Prosecutor William Forbes as an "expert" on the issue of effective assistance of counsel. After the omnibus hearing, the Appellant introduced a report from Doctor/Lawyer Cyril Wecht.¹⁰ (HR 223.) Both opined that the Appellant received ineffective assistance of counsel.

¹⁰Dr. Wecht was indicted on January 20, 2006, for theft of honest services, mail fraud, wire fraud, and theft from an organization receiving federal funds.

Ineffective assistance of counsel claims are mixed questions law and fact. *State ex. rel. Hatcher v. McBride*, 221 W. Va. 760, 763, 656 S.E.2d 789, 792 (2007). Whether an attorney's conduct was the product of trial strategy is a question of fact. Whether a strategic or tactical decision fell within the wide range of professional competence is an issue of law.¹¹ An expert witness may not give an opinion on a question of law. Such testimony encroaches on the judge's role as the sole arbiter of the law. *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988); *Morris v. Boppa*, 182 W. Va. 248, 251, 387 S.E.2d. 302, 305 (1989).

Factually, neither Mr. Forbes' nor Dr. Wecht's testimony is particularly compelling. All that it demonstrates is that three lawyers would have tried the same case using different defense strategies. Neither Mr. Forbes or Dr. Wecht reviewed defense counsel's trial notebook or time sheets. Neither had any insight into Mr. Dameron's thought processes or strategic decision-making process. Given the almost unlimited trial strategies available to counsel, Mr. Forbes' and Dr. Wecht's Monday morning quarterbacking is not probative. *Provenzano v. Singletary*, 148 F.3d 1327, 1331-32 (11th Cir. 1998).

As to the reasonableness of counsel's strategic decisions that is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof:

[I]t would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

Provenzano, 148 F.3d at 1332-33.

¹¹Rule 704 of the West Virginia Rules of Evidence permits an expert to testify to an ultimate issues relating to factual questions.

Dr. Wecht also offered his opinion as to the cause of death. Rule 702 of the West Virginia Rules of Evidence permits expert testimony that is both relevant and reliable. Expert testimony is relevant when it assists the trier of fact to understand the evidence. It is reliable when it is based on sufficient facts or data, the product of reliable principles and methods, and the expert applies the principles and methods reliably to the facts of the case. *Neal-Lomax v. Las Vegas Metropolitan Police Dept.*, 574 F. Supp. 2d 1193, (D. Nev. 2008). See also *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579, 591 (1993).

Dr. Wecht's opinion as to the victim's cause of death was neither relevant nor reliable. It was wholly speculative. The doctor did not appear at the omnibus hearing, and was never cross-examined on the contents of his report.¹² He did not review the State's autopsy report, examine the body or visit the scene of the crime before offering his opinion as to the cause of death. (HR 320, 552.) See *Commonwealth v. Haggerty*, 509 N.E.2d at 1165 (defense expert reviewed autopsy report, death certificate, hospital records, and testimony of state's experts before offering opinion on cause of death). Despite this, Dr. Wecht opined that the victim died from cranial trauma and diminished consciousness from intoxication. (HR 229.) Later he stated:

The presence of mud in the lungs and upper gastrointestinal tract signifies a terminal event that occurred reflexively with death and was *not necessarily* the cause of death.

(HR 230; emphasis added.)

¹²Habeas counsel requested the habeas court's permission to hire a psychological expert, a forensic expert, and an expert in criminal defense on May 15, 2002. Defense counsel presented one expert, William Forbes, on the issue of trial counsel's performance. Counsel reserved the right to present additional testimony from forensic pathologist and psychiatric expert. In its order following the May 12, 2004, evidentiary hearing, the state habeas court held that it would reconvene the evidentiary hearing if it believed it was necessary. The court did not reconvene the hearing, but did consider Dr. Wecht's report. (HR 207-08.)

Dr. Wecht could not opine with any certainty how the victim died. *See Westberry v. Gislavid Gumm AB*, 178 F.3d 257 (4th Cir. 1999) (expert testimony is admissible to aid the fact-finder only if the testimony is based on sufficient facts and data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliability to the facts of the case.). Because his opinion is based on such a paucity of facts, the habeas court's decision not to give Dr. Wecht's report weight was eminently reasonable.

2. Diminished Capacity and Competency at the Time of Trial.

Appellant next claims that defense counsel failed to properly investigate the defense of diminished capacity due to intoxication.¹³ "Provided an accused did not intentionally become intoxicated as to prepare himself for the commission of the crime, intoxication of an accused is a defense to a charge of murder in the first degree, when the degree of intoxication is such as to render the accused incapable of premeditation or deliberation." Syl. Pt. 2, *State v. Bragg*, 140 W. Va. 585, 585-86, 87 S.E.2d 689, 691 (1955).

The facts demonstrate that the killing was not a "spur of the moment" decision. The Appellant, along with his two friends, acted out of a desire for revenge. Prior to killing the victim, the Appellant drove to the victim's house and confronted him. Days later, when they found the victim passed out and intoxicated in a field near a bar, they loaded him into the Appellant's car and drove him to a secluded bridge over a creek in Putnam County. The three acted in concert, striking the victim so hard that he fell to the ground. Once he had fallen the Appellant lifted him up and threw him over the bridge into the creek. After hearing him moan, the Appellant and Mr. Templin

¹³The Appellant does not argue that he was incompetent to stand trial, only that he was too intoxicated to premeditate or deliberate on the act of killing the victim.

walked down to the creek. Mr. Warner heard Mr. Templin instruct the Appellant to keep hold of the victim. They returned about five to ten minutes later, their clothes wet and muddy. The first thing the Appellant did was to dispose of his muddy clothing. (OH 34-35.) In addition to Mr. Warner's testimony, the jury heard from several other witnesses who heard the Appellant state that he held the victim's head underwater until he was dead.

Reasonable counsel could have decided because his client would have to admit that he killed the victim if he asserted a diminished capacity defense, adopting the defense would undermine his claim that the victim was dead before he hit the water. The cause of death was not, according to the Appellant, drowning; rather, the cause of death was cranial injury resulting from the blow to the victim's head.

Mr. Casey described his client as a "sharp guy" and "lucid." Although there was some indication that the Appellant had been drinking and taking drugs before committing the act, defense counsel did not feel it was an issue. (OH at 49.)

More importantly, the Appellant has failed to introduce any concrete evidence suggesting that had defense counsel asserted this defense or had the Appellant been psychologically evaluated before trial, it would have made any difference. Defense counsel cannot merely point out Appellant's alcoholism as evidence of Appellant's incompetence: Such a position is pure speculation. There must be solid evidence of diminished capacity at the time of the offense or incompetency at the time of the trial. Neither are present.

3. **Failure to Subpoena a Key Witness.**

Appellant next claims that defense counsel failed to subpoena a key witness, Ernest Templin. Mr. Templin was one of the Appellant's co-defendants and was present when the victim was murdered. "Complaints of uncalled witnesses are not favored [in habeas corpus] because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007) (citations omitted.) Although he claims that failure to subpoena this witness constituted ineffective assistance of counsel, the Appellant makes no attempt to prove what Mr. Templin would have testified to or how his testimony would have benefitted him. Nor has the Appellant demonstrated that Mr. Templin was available to testify. *See King v. State*, 649 S.W.2d 42 (Tex. Crim. App. 1983) ("Counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony.").

Excerpts from the Omnibus Hearing demonstrate the speculative nature of this claim:

- Q: And if you have put [Templin] on the stand, *he could have* done one of two things, *theoretically, or you would presume he would have done one of two things*. That's the experience – One was, he'd blame somebody besides himself. That's a fair statement, right?
- A: Right.
- Q: I mean, *could be*, wouldn't be unusual if he blamed your client?
- A: No, that's how things normally happen.
- Q: And then in arguing reasonable doubt you have two people there that *could just* have easily been the person who committed the drowning, right?

A: If the drowning was the cause of death, you have, you would have reasonable doubt as to who the perp was.

Q: Okay. And you didn't have that, because he wasn't there.

A: Right.

Q: Okay. *Or he could have* got on the stand and taken the Fifth [Amendment] right?

A: Or he could have got on the stand and admitted it, but that's –

(OH at 43-44; emphasis added.)

Defense counsel testified that the decision not to call Mr. Templin was strategic:

Q: And the people that worked up your case for you or you or whoever, didn't have Mr. Templin available to testify. And if I recall what you've told me before, it is that what *you intended to do as one of your defenses* was when you couldn't locate Mr. Templin, was to simply say, where is he at, *and try to blame the empty chair*, right?

A: *Right.*

Q: But that somewhat backfired on you, didn't it?

A: I think it did.

Q: Okay, how'd that backfire?

A: Well, because the investigator was called as a witness and he testified that he had talked to Ernie on the phone shortly before the trial and I that the jury inferred from that we had access to him and the State didn't. We didn't bring him up, so therefore, he would hurt our case.

(OH 46-47; ED 46-48.)

Q: And you made a decision not, even after you knew where Mr. Templeton, was, or Templin, excuse me, where your investigator talked to him. Did you even consider getting Mr. Templin back here?

A: I didn't think that we, we didn't really make a conscious decision, one way or another, we just kind of figured he'd come back and point the finger at our client.

Q: Any you didn't want that.

A: We didn't want it. Particularly in view if the State's giving one guy immunity, then give two guy immunity, why load their gun?

(OH 78-79.)

To prevail, the Appellant must prove that defense counsel adopted a strategy that no reasonable attorney would have chosen. *Strickland*, 466 U.S. at 688. As the above text demonstrates, defense counsel chose not to subpoena Templin and to adopt the "empty chair" defense. In hindsight, this strategy may not have yielded the result defense counsel had hoped for, but it was a reasonable. *Id.* at 689 (judicial scrutiny of counsel's performance is deferential, and must avoid the distorting effects of hindsight). Sometimes an empty chair is more eloquent than a witness who is willing to point the finger of guilt at your client.

4. Failure to Conduct a Proper Investigation.

As the allegations contained in this claim center around Mr. Dameron's performance having nothing to do with Mr. Casey, a review of Mr. Casey's comments about Mr. Dameron and the quality of his work is illuminating.

Upon his appointment, Mr. Dameron served the State with a motion for discovery and Inspection including requests for any statements by the Appellant, a list of the State's witnesses, and copies of their statements. (TR 23-29.) He also requested a copy of the Grand Jury transcript. (TR 30.)

In his deposition Mr. Casey testified that he felt “confident” upon receiving the trial notebook from Mr. Dameron, and that he “knew what the witnesses would say.” He testified that Mr. Dameron had done a “fairly good job” preparing the trial notebook. (OH at 70.) Defense private investigator Frank McCallister contacted “some if not all, the witnesses that we could get to and got statements from them.” In terms of facts, Mr. Casey testified that he had a “pretty good idea where we were going.” (ED 12-13; OH at 69.) Neither he nor Mr. Dameron considered hiring an expert as to the cause of death because Kevin Warner admitted hitting the victim with a tire iron, and the autopsy report fixed the cause of death at drowning and cranial fracture. (ED at 31.)

Although Mr. Casey claimed he was overworked at the time the trial court appointed him, he tried four murder cases during this same time period, leading to three acquittals. (OH at 68.)

When asked how he felt prior to trying the case, Mr. Casey testified:

I didn't feel real bad, I thought that, you know, *we were in fairly good shape*, in terms of what we thought the State was gonna put on and what our defense was gonna be.

(OH at 73; emphasis added.)

Later, Mr. Casey testified:

Q: Mr. Casey, going into this trial with Mr. Rosenberger, did you, based on your preparation for it, did you think you knew the strengths and weaknesses of that case?

A: I think I had a understanding of what the strengths of the State's case was, with, I felt fairly good going into the trial. We had a pretty good defense, we had a pretty good, I thought, fairly good defense going in.

(OH at 97.)

Throughout his testimony, Mr. Casey claimed that both he and Mr. Dameron could have done a better job defending the Appellant. The Appellant points to this as evidence of constitutional

ineffectiveness. But every attorney who loses a case is subject to second-guessing, and, more importantly, may second-guess themselves. A simple admission by counsel that they could have done a better job falls far short of the burden imposed by *Strickland*. To prevail, the Appellant must prove that no counsel would have conducted themselves in the same fashion as defense counsel. *Strickland*, 466 U.S. at 688-89. He has failed to do so.

B. CUMULATIVE ERROR.

“Cumulative error analysis applies when there are two or more actual errors; it does not apply to the cumulative effect on non-errors.” *United States v. Nichols*, 169 F.3d 1255, 1269 (10th Cir. 1999), *cert. denied*, 528 U.S. 934 (1999). This Court has applied the doctrine to direct appeals. Syl. Pt. 5, *State v. Smith*, 156 W. Va. 385, 193 S.E.2d 550 (1972) (cumulative error occurs where the trial court record shows that the cumulative effect of harmless errors prevent the defendant from receiving a fair trial); *State v. Brown*, 210 W. Va. 14, 29, 552 S.E.2d 404, 419 (2001). It has also applied it to civil cases. See *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 118, 459 S.E.2d 374, 395 (1995). This Court has held that this doctrine should be applied sparingly.¹⁴ (*Id.*)

These rulings do not apply to the case at bar. This Court has repeatedly held, “A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed.” Syl. Pt. 4, *State ex. rel. McMannis v. Mohn*, *supra*. See also *State ex. rel. Phillips v. Legursky*, 187 W. Va. 607, 608, 420 S.E.2d 743, 744 (1992).

There is no evidence of constitutional error in the record; indeed, there is no evidence of ordinary trial court error. The Appellant is seeking a second opportunity to re-litigate claims rejected

¹⁴And it has. Of the 45 civil and criminal cases the Appellee found raising this issue, only two were reversed. See *State v. Schermerhorn*, 211 W. Va. 376, 381, 566 S.E.2d 263, 268 (2002); *State v. Smith*, *supra*.

by the lower court in his motion for a new trial and this Court on direct appeal. This Court need not go over the same ground again.

1. **The Prosecutor Did Not Improperly Vouch the Record.**

A writ of habeas corpus will not issue upon a claim of prosecutorial misconduct unless the Appellant proves that the prosecutor's conduct, "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainright*, 477 U.S. 168, 181 (1986). In determining whether such prejudice exists this Court should examine the totality of the circumstances, including: "(1) the severity of the prosecutor's conduct; (2) what steps, if any, the trial court may have taken to remedy any prejudice; and (3) whether the conviction was certain absent the prejudicial conduct." *Bentley v. Scully*, 41 F.3d 811, 824-825 (2d Cir. 1994).

A prosecutor can address in closing argument a witness's demeanor, motive for testifying, and believability provided such remarks are based on the evidence or fair inferences drawn from it, and are not based on the prosecutor's personal beliefs. *Commonwealth v. Freeman*, 712 N.E.2d 1135 (Mass. 1999). A prosecutor may not vouch for the testimony of a witness by expressing a personal belief in the credibility of the witness or indicating that he has knowledge independent of the evidence before the jury. *Commonwealth v. Wilson*, 693 N.E.2d 158 (Mass. 1998).

After a brief discussion of the law, the Appellant lists sixteen examples of allegedly improper prosecutorial vouching. He makes no effort to connect the law to the facts. His examples are a mere laundry list, devoid of explanation. This Court has stated, "we liberally construe briefs in determining issues presented for review, issues which are mentioned only in passing but are not supported by pertinent authority are not considered." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996) (citation omitted.)

In the case at bar the Appellant has utterly failed to point out what portions of the numerous quotations constitute improper vouching, thus leaving this Court and opposing counsel with the job of sniffing out these allegedly improper quotes. This is not the Court's job.

Even if this Court were to address the substance of Appellant's claim, the outcome would be no different. The examples cited by the Appellant do not exhibit improper vouching. Counsel for the State's summation was solidly rooted in the record. His statements were not based upon his personal opinions, but on the evidence adduced at trial.

2. Dr. Sopher's Testimony.

Appellant next claims that the trial court had an affirmative obligation to instruct the jury to ignore Dr. Sopher's testimony as inherently unreliable and biased. There is no legal basis for this claim. Dr. Sopher testified and was subject to cross-examination. The Appellant does not claim that the trial court improperly limited the scope of cross. Although he may not have liked the answers, that is not a reason to strike the testimony.¹⁵

3. Venue.

Appellant next claims that the State failed to establish venue. A review of the record proves him wrong. Trooper Charles Martin identified the location of the body as Putnam County, West Virginia:

Q: And do you recall becoming involved in the investigation of the death of a man that was later identified as John William Fallecker?

A: I am

¹⁵Appellant points to Judge Watt's post-verdict statements regarding Dr. Sopher's testimony. These comments were not made during trial. Nor do they provide a valid reason for striking Dr. Sopher's testimony. Witness credibility is not the province of the trial court: it is the jury's job to determine who is credible, and how much weight to afford each witness.

Q: And at some point in time did you go to a scene where there was a body located?

A: I did.

Q: Is that the same body that was later identified as John Fallecker?

A: That's correct.

Q: Where was that?

A: In Putnam County approximately six miles out from 60 on a side road in a creek. I refer to it as Trace Creek, or Trace Fork, or Mud River.

(TT 253.)

4. Premeditation.

The Appellant alleges that the Court committed error when it did not grant a motion for a directed verdict on the basis of insufficient evidence to support the conviction. The Appellant would have this Court believe that all of the witnesses who testified provided no competent evidence from which a reasonable jury could find premeditation. Kevin Warner testified that he, the Appellant, and Mr. Templin did not pick up the victim to take him home; instead, they were taking him to a secluded spot where they could "whip his ass." (TT 9, 192.) This statement clearly shows that the participants knew what they were going to do with the victim. Further, the Appellant himself on cross-examination testified that they were going to teach him [the victim] a lesson. That's what I thought the purpose was." Upon further inquiry the Appellant was asked, "You were going along with that?" The Appellant's response to this inquiry was, "Yes. sir I was." (TT. 462.)

The Appellant's allegation that there was no competent evidence presented that would justify the verdict is facially incorrect. A review of the complete trial in this matter shows that numerous witnesses, including the Appellant, gave competent testimony that the jury could rely on to make its

determination. This Court in Syl. Pt.1, *State v. Guthrie*, 194 W. Va. 657, 461 S.E.2d 163 (1995), states, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.” The evidence, when viewed in a light most favorable to the prosecution, did allow the trier of fact, being the jury, to make a determination of guilt.

5. Chief Investigator Martin’s Notes.

Appellant’s next claim revolves around Chief Investigator Charles Martin’s missing investigative notes. According to the Appellant, the trial court’s failure to apply the *Osakalumi* test to the missing notes was reversible error. *See State v. Osakalumi*, 194 W. Va. 758, 461 S.E.2d 504 (1995).

Charles R. Martin testified that he was unaware of the location of his handwritten notes; however, he further testified using his official report to assist with his recollection of the events. Sgt. Martin was the lead investigator on this case until he was transferred. Sgt. Martin’s testimony was of firsthand knowledge he had concerning the events and his investigation of the crime.

The Appellee submits that the Appellant has failed to show that the court’s lack of analysis regarding the notes prejudiced the Appellant or denied him a fair trial

6. Kathy Cottrill.

Appellant next alleges that the trial court committed error when it failed to grant the Appellant a new trial on the basis of the State using Kathy Cottrill as a witness. The Appellant alleges “unfair surprise” by the State’s use of Ms. Cottrill. The prosecution had disclosed Ms. Cottrill as a potential witness to the Appellant which put him on notice that she may or may not be called. If the Appellant’s counsel chose not to be prepared for Ms. Cottrill, then that was a tactical

decision. More importantly, Mr. Casey's time sheets reveal that on September 11, 1995, he reviewed Ms. Cottrill's pretrial statement. (Supp. R, Ex. B.)

The Appellee submits that the Appellant has failed to show that they were unaware of Ms. Cottrill as a potential witness and therefore "surprised" by her appearance.

7. Guthrie Instruction.

Appellant next claims that the trial court improperly instructed the jury on the issues of premeditation and deliberation pursuant to *State v. Guthrie, supra*. The instruction, State's No. 2, as given was more help to the Appellant than harm. The Court in *Guthrie* expanded the meaning of deliberate and premeditate to mean more than forming the intent at the immediate time of the killing. The Court in *Guthrie*, however, specifically states, "We leave intact the *Clifford* rule as amplified by *Hatfield*." Further stating, "[w]hat came about as a mere suggestion in *Hatfield*, we now approve as a proper instruction" *Guthrie, supra*.

Further this Court has stated in Syl. Pt. 8 *State v. Walls*, 170 W. Va. 419, 294 S.E.2d 272 (1982), "[w]hen instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict." When the instructions given are reviewed as a whole, they adequately advise the jury of all necessary elements needed for their consideration.

The Appellee submits that the Appellant has failed to show that the instruction as given was prejudicial to the Appellant and that the jury was not fully informed as to the elements necessary for their consideration. Further, the Appellee submits that any error as a result of State's Instruction 2 was harmless.

V.

CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court of Putnam County should be affirmed by this Honorable Court.

— Respectfully submitted,

DAVID BALLARD, Warden,
Mount Olive Correctional Complex,
Appellee,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

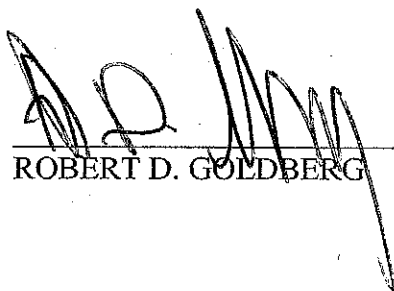


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CERTIFICATE OF SERVICE

The undersigned counsel for Appellee hereby certifies that a true and correct copy of the foregoing "*Brief of Appellee*" was mailed to counsel for the Appellant by depositing it in the United States mail, first-class postage prepaid, on this 27th day of March, 2009, addressed as follows:

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